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No. 88-1899

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STEVEN LEVINE,

Petitioner,

v.

CHIEF JUSTICE NATHAN S. HEFFERNAN,
JUSTICE SHIRLEY S. ABRAHAMSON,
JUSTICE WILLIAM A. BABLITCH,
JUSTICE WILLIAM G. CALLOW,
JUSTICE LOUIS J. CECI,
JUSTICE ROLAND B. DAY,
JUSTICE DONALD W. STEINMETZ,
and
STATE BAR OF WISCONSIN and STEPHEN L. SMAY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS STATE BAR OF WISCONSIN AND STEPHEN L. SMAY

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QUESTION PRESENTED

Does the Wisconsin Supreme Court Rule integrating the State Bar of Wisconsin, upheld by this Court in *Lathrop v. Donohue*, 367 U.S. 820 (1961), violate the First and Fourteenth Amendments to the United States Constitution?

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BRIEF IN OPPOSITION FOR RESPONDENTS STATE BAR OF WISCONSIN AND STEPHEN L. SMAY

Respondents State Bar of Wisconsin ("State Bar") and State Bar Executive Director Stephen L. Smay, by their undersigned attorneys, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Seventh Circuit's opinion in this case. That opinion is reported at 864 F.2d 457 (7th Cir. 1988).

STATEMENT OF THE CASE

The present lawsuit concerns a constitutional challenge to the existence and activities of Wisconsin's integrated bar which is virtually identical to that considered by this Court in *Lathrop v. Donohue*, 367 U.S. 820, *reh'g denied*, 368 U.S. 871 (1961). Specifically, petitioner in this case challenges under the First and Fourteenth Amendments the requirement that all attorneys licensed to practice law in the state pay annual dues to the State Bar. Complaint (D. Ct. Docket #2), ¶ 52. Alternatively, petitioner challenges the constitutionality of the State Bar's expenditure of recent membership dues on alleged political and ideological activities. Complaint, ¶ 56.

On February 19, 1988, the United States District Court for the Western District of Wisconsin rendered its decision on the parties' cross-motions for summary judgment. 679 F. Supp. 1478. The court granted petitioner's motion for summary judgment, finding "the mandatory membership requirement a constitutionally impermissible burden on plaintiff's rights of association and speech." *Id.* at 1502. In so holding, the district court found that *Lathrop* no longer controlled, surmising that this Court would now apply a strict compelling interest test to the integration rule and that the State Bar of Wisconsin no longer performed the functions found sufficient in *Lathrop*. *Id.* at 1493-94.

Based on this holding, the court did not reach petitioner's alternative argument "concerning the constitutional adequacy of the Bar's procedures for reducing the dues of dissident members by the pro rata amount spent on legislative activities." *Id.* at 1502.

The district court's February 19, 1988 decision was the first—and still only—in the country to find the concept of an integrated bar itself unconstitutional. *See, e.g., Hollar v. Gov't of the V.I.*, 857 F.2d 163, 166-68 (3rd Cir. 1988) (upholding constitutionality of integrated bar); *Gibson v. The Florida Bar*, 798 F.2d 1564, 1568-69 (11th Cir. 1986) (assuming same); *Petition of Chapman*, 128 N.H. 24, 509 A.2d 753, 757 (1986) (assuming same); *Falk v. State Bar of Michigan*, 411 Mich. 63, 138, 305 N.W.2d 201, 228 (1981) (assuming same), *sub proceedings*, 418 Mich. 270, 342 N.W. 2d 504 (1983), *cert. denied*, 469 U.S. 925 (1984).[1]

On appeal, the United States Court of Appeals for the Seventh Circuit rejected the district court's conclusion that *Lathrop* is no longer controlling on the issue of the constitutionality of Wisconsin's integrated bar. 864 F.2d 457 (7th Cir. 1988). Writing for a unanimous panel, Judge Flaum found nothing in the subsequent case law of this Court or lower courts which cast doubt on the continued vitality of *Lathrop*'s basic holding. To the contrary, the Court of Appeals noted that (1) "no Supreme Court justice has ever questioned the validity of *Lathrop*," (2) "all lower courts when faced with challenges to integrated bars have expressly followed . . . *Lathrop*," (3) the precedents relied upon by the district court were not "in the

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[1] On March 3, 1988, the District Court for the District of Puerto Rico found Puerto Rico's compulsory bar membership rule unconstitutional. *See Schneider v. Colegio de Abogados de Puerto Rico*, 682 F. Supp. 674 (D.P.R. 1988). In *Schneider*, however, the district court assumed the constitutionality of integrated bars generally but held that the Puerto Rican Bar was in violation of dissenters' nonassociational rights where the Bar's political activities were extensive, evidence of the Bar's other activities was not provided, and no procedure was in place to protect adequately the interests of dissenting members. *Id.* at 681-91.

identical area of law," and (4) no Supreme Court precedent "has applied a compelling interest test in analyzing *mere* compulsory dues requirements." *Id.* at 461 (emphasis in original).

The Seventh Circuit also rejected the district court's conclusion that *Lathrop* was decided "on an essentially different factual record." *Id.* at 462. The Seventh Circuit found that the present integrated bar continues to have "the multifaceted character" approved by this Court in *Lathrop*. *Id.*

Having concluded that *Lathrop* was controlling on the issue of the constitutionality of the integrated bar, the Seventh Circuit remanded the case for entry of summary judgment on that issue. *Id.* at 463. Without expressing an opinion, the court also remanded for further consideration of petitioner's alternative claim that the State Bar's use of compulsory membership dues to fund alleged political and ideological activities violated the First Amendment. *Id.* Rather than immediately pursuing that claim on remand, this petition was filed.[2]

SUMMARY OF ARGUMENT

Petitioner is asking this Court to revisit an issue settled in *Lathrop*: whether the First Amendment precludes the Supreme Court of Wisconsin from requiring that attorneys

[2] Following the Seventh Circuit's decision, the Wisconsin Supreme Court decided to continue the suspension of its rule mandating the payment of State Bar dues pending disposition by this Court.

be dues-paying members of the State Bar as a condition of practicing law. Petitioner asserts that the holding in *Lathrop* requires reexamination in light of subsequent decisions of this Court and changes in the structure of the State Bar of Wisconsin. Neither assertion justifies the issuance of a writ to reconsider *Lathrop*.

The *Lathrop* Court upheld the constitutionality of the integrated bar concept over a sole dissent. The Seventh Circuit concluded that no decision of this Court has since called into question that basic holding. Indeed, subsequent decisions are in complete harmony with *Lathrop*.

Petitioner is equally mistaken in asserting that this Court should reconsider *Lathrop* based on claimed changes in the structure and activities of the State Bar. The record amply supports the Seventh Circuit's finding that the State Bar continues in its structure and activities in a manner substantially similar to that approved in *Lathrop*. In any event, petitioner's challenge to the Seventh Circuit's analysis of the structure and activities of this one particular bar association presents a highly fact-bound question that hardly constitutes a "special and important" reason warranting plenary review by this Court.

Finally, petitioner asserts that conflicts in lower court decisions justify a reexamination of *Lathrop*. The opposite is true. The Seventh Circuit's decision here is in harmony with *all* other federal and state court decisions, including the decisions of the two other courts of appeals that have considered the issue. Rather than causing conflict, the *Lathrop* holding has become the rock bed upon which all these courts have considered challenges to the existence and activities of integrated bars. To the extent any continued dispute exists over integrated bars, it is in challenges to specific activities of these bars. This is the very

issue that was reserved in *Lathrop*, was remanded by the Seventh Circuit below, and has yet to be addressed by the district court in this case. Petitioner's apparent invitation to the Court to address those issues on this record is at best premature, just as it was in *Lathrop*.

REASONS FOR DENYING WRIT

I.

PETITIONER'S CHALLENGE TO THE CONSTITUTIONALITY OF THE INTEGRATED BAR RULE ADOPTED BY THE SUPREME COURT OF WISCONSIN IS FORECLOSED BY THIS COURT'S DECISION IN *LATHROP*.

This Court plainly and unambiguously upheld Wisconsin's integrated bar rule in *Lathrop*. Nothing in subsequent case law or in revisions to the State Bar's structure requires that this holding be revisited.

A. The *Lathrop* Decision.

In *Lathrop*, a plurality of this Court (Justice Brennan, joined by Chief Justice Warren and Justices Clark and Stewart) upheld Wisconsin's mandatory membership requirement against a First Amendment challenge, while concluding that the record was not adequate to decide the narrower issue of whether certain of the Bar's "political" activities violated Lathrop's right of free speech.

The plurality's analysis emphasized that the requirement of membership in the State Bar did not compel Lathrop to associate with anyone, but only to pay dues. 367 U.S. at 827-28. Comparing the case to *Railway Employes' Dep't v. Hanson*, 351 U.S. 225, *motion denied*, 351 U.S. 979,

reh'g denied, 352 U.S. 859 (1956), the plurality noted that the Court was faced "only with a question of compelled financial support of group activities, not with involuntary membership in any other aspect." 367 U.S. at 828.

In its decision, the plurality reviewed the opinions of the Wisconsin Supreme Court which reflected the deliberate and careful consideration given to integrating the State Bar. *Id.* at 831-33. The plurality opinion examined at length the multiple purposes of the State Bar prescribed by Wisconsin Supreme Court Rule upon integration:

> to aid the courts in carrying on and improving the administration of justice; to foster and maintain on the part of those engaged in the practice of law high ideals of integrity, learning, competence and public service and high standards of conduct; to safeguard the proper professional interests of the members of the bar; to encourage the formation and activities of local bar associations; to provide a forum for the discussion of subjects pertaining to the practice of law, the science of jurisprudence and law reform, and the relations of the bar to the public, and to publish information relating thereto; to the end that the public responsibilities of the legal profession may be more effectively discharged.

Id. at 829 (quoting Wis. S.C.R. 1, § 2 (1956)). The plurality further noted that various committees and sections of the State Bar were established to fulfill these purposes and described in detail many of their assigned functions. *Id.* at 829-32 & n.7.

The plurality also reviewed the thorough record before the Wisconsin Supreme Court that demonstrated the Bar's activities promoting the public interest, including educating lawyers, improving the efficiency and effective-

ness of handling of grievances, preventing the unauthorized practice of law, and providing legal aid and public education about legal matters. *Id.* at 839-42. By comparison, the plurality concluded: "it seems plain that legislative activity is not the major activity of the State Bar." *Id.* at 839. The plurality therefore rejected Lathrop's claim that an integrated bar violated his First Amendment right of association:

> Given the character of the integrated bar shown on this record, in the light of the limitation of the membership requirement to the compulsory payment of reasonable annual dues, we are unable to find any impingement upon protected rights of association.

Id. at 843. At the same time, the plurality concluded that the record did not permit the Court to decide Lathrop's "constitutional claim insofar as it rests on the assertion that his rights of free speech are violated by the use of his money for causes which he opposes." *Id.* at 845.

Justices Harlan, Frankfurter, and Whittaker concurred in the plurality's opinion upholding the integrated bar, though each Justice would have gone further to reject outright the notion that mandatory bar dues (even if used on legislative matters) infringe on a dissenting bar member's constitutional rights. *Id.* at 848-65. In separate dissenting opinions, Justices Black and Douglas also objected to the plurality's decision not to address the constitutionality of the expenditure of mandatory dues on "political" activities on the record presented, but would have found such expenditures violated the First Amendment. *Id.* at 865-85. Justice Black, however, did not dispute—as petitioner would here—the basic holding of the *Lathrop* plurality: that the Supreme Court of Wisconsin could require all attorneys practicing in Wisconsin to provide

financial support for the non-political activities of the State Bar.[3]

B. The *Lathrop* Decision Upholding Compulsory Payments To Support The Public Purposes Of The State Bar Is Consistent With Subsequent First Amendment Decisions Of This Court.

As the Seventh Circuit noted, no opinion of this Court has ever questioned the validity of *Lathrop*. Petitioner nevertheless asserts that this Court's First Amendment decisions—in particular those involving the union shop—have undermined the "deferential standard" applied in *Lathrop* to mandatory membership dues. Petition, pp. 16-21.

On a general level, petitioner asserts that since *Lathrop*, this Court has uniformly applied a strict "compelling state

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[3] Justice Black emphasized that, in his view, Lathrop was "not denying the power of the State of Wisconsin to provide that its bar shall engage in non-political and non-controversial activities or even the power of the State to provide that all lawyers shall pay a fee to support such activities." 367 U.S. at 877. Instead, Justice Black understood Lathrop to be challenging the compelled payment of dues "to further the views of a majority . . . of the Wisconsin State Bar when that controlling group is trying to pass laws or advance political causes that he is against." *Id.* It was on that issue—not on the larger question of the constitutionality of the integrated bar itself—that Justice Black would have reversed and remanded "to require refund of the dues exacted under protest from the appellant in order to permit the Wisconsin State Bar to advocate measures he is against and to oppose measures he favors." *Id.* Even Justice Douglas's dissenting opinion—which can be read as rejecting any form of compelled membership in a bar organization—appears to approve compelled contributions from all lawyers for certain public purposes including to create "a fund out of which clients would be paid in case attorneys turned out to be embezzlers" or "to raise money to finance the defense of indigents." *Id.* at 881.

interest test" for any impingement of First Amendment rights. *Id.*, p. 16. In support of this assertion, petitioner string cites cases before this Court which involved First Amendment infringements. *Id.* As the Seventh Circuit noted below, most of these cases concern this Court's strict scrutiny of a statute or government policy directly infringing on *core* First Amendment values and therefore have little or no application to this case. *See, e.g., Elrod v. Burns*, 427 U.S. 347 (1976) (reviewing alleged policy of dismissal from public employment for non-affiliation with political party then in office); *Buckley v. Valeo*, 424 U.S. 1 (1976) (considering campaign laws limiting political contributions); *Kusper v. Pontikes*, 414 U.S. 51 (1973) (involving a statute which prohibited a person from voting in primary of one political party if he or she voted in primary of another party within preceeding two years).

While petitioner correctly points out that this Court has recognized that the First Amendment protects non-political, expressive conduct and non-political associations (Petition, pp. 20-21), the notion that state restrictions on at least some of those activities—or on essentially non-expressive conduct—will invariably be subjected to the same level of scrutiny is inconsistent with a wide range of First Amendment decisions which acknowledge (1) the "exacting scrutiny" applied to regulation of "core political speech" (*see, e.g., Meyer v. Grant*, ____ U.S. ____, 108 S. Ct. 1886, 1891-92 (1988)), and (2) a lesser level of scrutiny for restrictions on certain other activities (*see, e.g., Shapero v. Kentucky Bar Ass'n*, ____ U.S. ____, 108 S. Ct. 1916, 1921 (1988) (applying lesser level of First Amendment scrutiny to regulation of lawyer's "commercial speech")).

Certainly none of the decisions cited by petitioner undermines the balancing of interests undertaken by this Court

in *Lathrop*. Indeed, some of the cases relied upon by petitioner demonstrate the varying rigor of the Court's First Amendment analysis depending upon the interests involved. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 225 (1977) (speaking of "important government interest" in considering a challenge to the agency shop); *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968) (acknowledging a "variety of descriptive terms" to characterize the governmental interest required, including "compelling" and "substantial," and applying the "important or substantial" test in considering statute prohibiting destruction of Selective Service registration card).[4]

Petitioner's assertion that this Court's decisions in the union shop context undermine the essential balancing undertaken in *Lathrop* is baseless. While petitioner notes that in *Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435, 455 (1984), this Court characterized compulsory contribu-

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[4] Petitioner argues that Justice Whittaker's description of the practice of law as a "special privilege" by itself undermines the vitality of *Lathrop*'s holding. Petition, pp. 18-20 (quoting *Lathrop*, 367 U.S. at 865 (Whittaker, J., concurring)). This argument is specious on at least two levels. First, this lone remark in Justice Whittaker's concurrence hardly constitutes a fundamental tenet, much less the foundation, of the *Lathrop* decision. Second, while the right/privilege distinction arguably suggested by Justice Whittaker's comment has been criticized in subsequent decisions of this Court, the Court has never undermined the more general notion that lawyers may properly be required to provide certain public services. *See Mallard v. United States District Court*, ___ U.S. ___, 109 S. Ct. 1814, 1823 (1989) (expressly reserving the question whether federal courts "possess inherent authority to require lawyers to serve"); *Supreme Court of Virginia v. Friedman*, ___ U.S. ___, 108 S. Ct. 2260, 2267 (1988) (quoting *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 287 (1985)) ("A 'nonresident bar member, like the resident member, could be required to represent indigents and perhaps to participate in formal legal-aid work.' ").

tion requirements as "a significant impingement on First Amendment rights," he fails to acknowledge that this Court also stated that the *Ellis* petitioners *did not and could not* "contest the legality of the union shop as such." *Id.* at 439 (citing *Railway Employes' Dep't v. Hanson*, 351 U.S. 225 (1956)). Similarly, in *Abood*, this Court deferred to the wisdom of the state legislature in authorizing an agency or a closed shop:

> Our province is not to judge the wisdom of Michigan's decision to authorize the agency shop in public employment. Rather, it is to adjudicate the constitutionality of that decision. The same important government interests recognized in the *Hanson* and *Street* cases presumptively support the impingement upon associational freedom created by the agency shop here at issue.

431 U.S. at 224-25.[5]

The *existence* of union shops has never been subjected to strict scrutiny. While both *Abood* and *Ellis* found that

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[5] In *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), the Court appears to have applied a stricter balancing test than used in earlier union shop cases in reviewing *procedures* established to safeguard against a nonunion employees' subsidization of political and ideological expressive activities. *Id.* at 301-09. At the same time, the Court described the agency shop itself as involving a "limited infringement on nonunion employees' constitutional rights." *Id.* at 303. Whatever the applicability of this stricter test to procedures, this Court has applied a more lenient balancing test in the union context generally as well as in other negative First Amendment cases. *See* discussions of *Abood* and *Ellis supra*. *See also* Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C.L. Rev. 995, 1016 (1982) ("In other words, negative First Amendment cases require a sliding scale approach to balancing. The more serious the infringement of individual interests, the more vital the asserted advancement of government interests must be to outweigh the infringement and vice versa.").

the use of mandatory union dues to finance direct political and ideological expressive activities did impinge on First Amendment rights—the question reserved in *Lathrop* as to activities of the integrated bar—neither decision suggests any retreat from the basic holding in *Hanson* that the public purposes of the union shop outweigh any First Amendment concerns. There is certainly no basis to extrapolate from these union shop decisions a general retreat by this Court from the same basic holding in *Lathrop*.

C. The Structure, Purposes, And Activities Of The State Bar Of Wisconsin Are The Same In All Material Respects As Those Approved In *Lathrop*.

Contrary to petitioner's misleading description of the current State Bar's structure and activities and somewhat tortured reading of this Court's *Lathrop* decision, the present structure, purposes, and activities of the integrated bar are not substantially different from its predecessor.[6]

The basic purposes for which the State Bar is established continue to be set out by Wisconsin Supreme Court Rule in only slightly altered form from those considered

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[6] The basic structure, organization, and activities of the present Wisconsin State Bar are set forth in the district court's rendition of undisputed facts. 679 F. Supp. at 1480-84. A more complete picture of the State Bar's structure, organization and, in particular, activities may be found in Wisconsin Supreme Court Rules establishing, defining, and restricting the activities of the State Bar, the State Bar Bylaws, the affidavit of the State Bar's Executive Director, Stephen L. Smay ("Smay Aff."), the affidavit of the State Bar's former president, Franklyn M. Gimbel ("Gimbel Aff."), and the exhibits included in three volumes of appendices provided the district court, all of record below. This material supplements and informs, rather than conflicts with, the district court's summary rendition of undisputed facts.

in *Lathrop*. *See* Wis. S.C.R. 10.02(2) Purposes (1987). The structure and organization of the State Bar are established by Supreme Court Rules, Wis. S.C.R. 10.01-10.14 (1987), and by State Bar Bylaws. The State Bar is organized into sixteen districts, each having at least one governor who is elected to represent that district in the Board of Governors meetings. Wis. S.C.R. 10.05(2); Gimbel Aff., ¶ 7. While all members are encouraged to vote, no member is required to exercise his franchise. Gimbel Aff., ¶¶ 6-8. The district court expressly found that "mandatory membership in the Bar still consists solely in the payment of dues, just as it did when *Lathrop* was decided." 679 F. Supp. at 1494.

Much of the work of the State Bar continues to be performed through its standing committees and sections. The thirteen standing committees remain substantially similar to those considered by this Court in *Lathrop*. State Bar Bylaw Art. IV. The State Bar's fifteen sections are divided into areas of substantive law or nature of practice. (D. Ct. Docket #46, Ex. 23.) Indirect and direct expenses of all Bar committees are borne by the State Bar. (D. Ct. Docket #46, Ex. 26, pp. 46-50.)

All activities of the State Bar are ultimately subject to the review and scrutiny of the Wisconsin Supreme Court. Gimbel Aff., ¶ 12. *See, e.g.*, Wis. S.C.R. 10.10 (Committee to Review Bar Performance). Since this Court's decision in *Lathrop*, the structure, purposes, and activities of the State Bar have undergone repeated and detailed review by the Wisconsin Supreme Court and by special committees appointed by that court.[7]

[7] *See In Re Regulation of the Bar of Wisconsin*, 81 Wis. 2d xxxv (1977); *State ex rel. Armstrong v. Board of Governors*, 86 Wis.

(Footnote continued on following page)

While the Wisconsin Supreme Court has consistently upheld mandatory support of the Bar's public purposes on the grounds that the integrated State Bar is better suited to accomplish those purposes and to fulfill the obligations of the bar to the public, the supreme court has repeatedly attempted to accommodate the interests of dissenting members. In particular, the State Bar is no longer permitted to engage in any direct political activities. *Report of Committee*, 112 Wis. 2d at xxv, 334 N.W. 2d at 549. The Wisconsin Supreme Court also has developed a rebate procedure and ultimately a "dues reduction" plan permitting objectors to deduct their *pro rata* share of bar dues expended for legislative activities at the outset of each fiscal year. *See* Wis. S.C.R. 10.03(5)(b).[8]

The undisputed evidence presented to the district court established that the State Bar continues to engage in a variety of activities in fulfillment of the express purposes approved in *Lathrop*. In particular, the State Bar continues to engage in a variety of activities germane to its charge of promoting the ethical practice of law, fostering and maintaining the competence of the bar and aiding the

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[7] *continued*

2d 746, 273 N.W.2d 356 (1979); *In Matter of Discontinuation of State Bar of Wisconsin as an Integrated Bar*, 93 Wis. 2d 385, 286 N.W.2d 601 (1980); *Report of Committee to Review the State Bar*, 112 Wis. 2d xix, 334 N.W.2d 544 (1983); *In the Matter of the Amendment of State Bar Rules: SCR 10.03(5)*, 127 Wis. 2d xi (1986); *In the Matter of the Petition to Review State Bar Bylaw Amendments*, 139 Wis. 2d 686, 407 N.W.2d 923 (1987).

[8] On April 19, 1986, the State Bar Board of Governors adopted a State Bar Bylaw providing for an arbitration procedure consistent with *Chicago Teachers Union* in the event a dispute arises between the Bar and a member concerning the allocation of expenditures to "legislative activities" as defined under Wis. S.C.R. 10.03(5)(b)1. *See Petition to Review Bar Bylaw Amendments*, 139 Wis. 2d at 689-94, 407 N.W.2d at 925-27.

courts in carrying on and improving the administration of justice in the state:

1. **Activities germane to promoting the ethical practice of law.**

(a) District Professional Responsibility Committees. The State Bar's District Professional Responsibility Committees, the successors to the original grievance committees noted with favor by both the Wisconsin Supreme Court and this Court in *Lathrop*, provide essential support to the Board of Attorneys Professional Responsibility (BAPR). Gimbel Aff., ¶ 22F; Wis. S.C.R. 21.08, 22.05. While committee member's expenses are separately reimbursed, the State Bar is charged with the responsibility of dividing the state into appropriate districts and with appointment of attorneys and at least one layperson to each of the district committees. Wis. S.C.R. 21.08(1).

(b) Committee on Professional Ethics. The Bar's Committee on Professional Ethics renders opinions on ethical questions. Gimbel Aff., ¶ 22A; State Bar Bylaws, Art. IV, § 5. The vast majority of these opinions are published and periodically compiled in summary form in the *Wisconsin Bar Bulletin*. Smay Aff., ¶ 6. Ethical opinions are also issued through staff counsel, verbally and in writing. Gimbel Aff., ¶ 22B. The Committee is also charged with the duty of responding to requests by the District Professional Responsibility Committees or by the Board of Governors for opinions as to the propriety of past or present conduct of attorneys. *See* State Bar Bylaws, Art. IV, Sec. 5.

(c) State Bar input into ethical issues and regulation. In addition to the Bar's participation in promoting

ethical conduct of its members through its formal committees, the Bar acts as a forum for discussion of ethical issues and ultimately recommends changes in rules and regulations to the Wisconsin Supreme Court. For example, the State Bar studied the BAPR procedures in-depth and filed a joint petition with BAPR to the Wisconsin Supreme Court for modification of procedures. Gimbel Aff., ¶¶ 19, 23F.

2. **Activities germane to promoting the competence and education of lawyers and to provide forums for discussion and exchange of ideas.**

(a) **Publications.** The Bar publishes seminar materials associated with its annual and mid-winter conventions; an *Annual Survey of Wisconsin Law* reviewing and updating twenty areas of substantive and procedural law; many permanent publications on various subjects in the law; the *Wisconsin Bar Bulletin*; a monthly newsletter; quarterly section newsletters; and a Supreme Court Calendar Service. Gimbel Aff., ¶¶ 22C, 25. In addition, the Bar publishes and maintains a "Lawyer-to-Lawyer Directory" facilitating the exchange of knowledge and legal expertise. Gimbel Aff., ¶ 22D.

(b) **Conventions and meetings.** The State Bar conventions and meetings of sections and committees provide open forums for the expression of views by all members on a variety of subjects pertaining to the practice of law, the science of jurisprudence, and law reform. Gimbel Aff., ¶ 25.

(c) **Legal education programs.** While the State Bar's ATS-CLE Division is separately funded, the Board of Governors and State Bar staff are intimate-

ly involved in the management and operation of ATS-CLE, making major policy decisions concerning the Division's budget and planning of continuing legal education programs for lawyers. Gimbel Aff., ¶ 18; Smay Aff., ¶ 10. The Bar Postgraduate Education Committee also makes recommendations of speakers and topics for ATS-CLE programming. Gimbel Aff., ¶ 18. Finally, the Bar Committee on Legal Education and Bar Admissions is charged with the duty to study the curricula and teaching methods employed in law schools and of standards and methods employed in determining qualifications for admission to the Bar. *See* State Bar Bylaws, Art. IV, § 2.

3. Activities germane to maintaining and improving the administration of justice.

(a) Improving the system for delivery of legal services to the public. A variety of Bar activities favorably impact, either directly or indirectly, the statewide system for delivery of legal services, only a few of which are listed here:

(1) The Bar developed, established (in conjunction with the Wisconsin Supreme Court), and (through one of its committees) operates a Clients' Security Fund to reimburse clients who sustain losses resulting from dishonest acts of lawyers. Gimbel Aff., ¶ 23A.[9]

(2) The Interest on Lawyers Trust Accounts program (IOLTA) provides for the application of

[9] The district court noted that the annual assessment made of lawyers to maintain this fund is in addition to annual State Bar membership dues, but also acknowledged that the fund is administered by the State Bar. 679 F. Supp. at 1481.

interest on lawyer's trust accounts to law-related charitable and educational purposes. Gimbel Aff., ¶ 23B. While IOLTA is now self-supporting, the State Bar spent monies over a three-year period to prepare a proposal for the Wisconsin Supreme Court to establish an IOLTA Program; once adopted, the Bar pledged a line of credit to assure IOLTA the necessary start-up financing; the Bar was active in the procurement of a Ford Foundation grant to further fund "WISTAF," the organization created to operate IOLTA; the bar continues to be involved in the administration of IOLTA through consultation between the Board of Governors and WISTAF; and the State Bar President, with the approval of the Board of Governors, is responsible for appointment of 12 of the 15 WISTAF Board members. Gimbel Aff., ¶ 23B; Smay Aff., ¶ 27.

(3) The Bar formed Wisconsin Lawyers Mutual Insurance Company (WILMIC) and contributed to its capitalization for the purpose of assuring that professional liability insurance will be available to Wisconsin lawyers, thus protecting clients and securing the financial responsibility of lawyers to the public. Smay Aff., ¶ 28.

(4) The Bar has also been involved in developing and/or supporting *pro bono* legal projects in Wisconsin. Smay Aff., ¶¶ 33, 34.

(b) **Promoting public understanding about the law and the legal system.** The Bar also engages in numerous activities to promote the public's understanding of the law and the legal system including:

(1) The State Bar maintains a "Lawyer Hotline" number which provides free advice to callers with simple or routine legal questions. Gimbel Aff., ¶ 19.

(2) The Bar Committee on Communications has engaged in numerous programs which facilitate communication between the bar and the public. Smay Aff., ¶ 18; Gimbel Aff., ¶¶ 19, 24. For example, the Bar has developed and disseminated consumer-oriented publications, including pamphlets, brochures and a *Consumer Guide to Wisconsin Law*. Gimbel Aff., ¶ 24.

(3) The Bar Media-Law Relations Committee's projects, involving lawyers, judges, educators and journalists, have promoted more effective communication and understanding of the law and legal process. Gimbel Aff., ¶ 24; Smay Aff., ¶ 29. For example, the Committee conducted a videotaped simulation of a trial presented to journalists as an educational device to improve media accounts of legal proceedings and periodically publishes and distributes updated editions of its *Lawyer's Guide to New Media* and *News Reporters Legal Handbook*. Smay Aff., ¶¶ 19, 29.

As the above summary amply demonstrates,[10] petitioner is simply mistaken in his assertion that the State Bar's role in promoting and regulating the ethical practice of law and the competence of the bar is less today than when considered by this Court in *Lathrop*. *See also* Justice's Brief In Opposition, Section II. The State Bar continues to be intimately involved in education of its members through publications, conventions and meetings and supervision of the State Bar's ATS-CLE division. *See* Gimbel Aff., ¶¶ 22, 25. While petitioner emphasizes the separate funding of ATS-CLE programs, the essential educational activities approved in *Lathrop* continue to be

[10] A substantially more detailed discussion of the current activities of the State Bar may be found in the Gimbel and Smay Affidavits.

financed by the State Bar. Similarly, the State Bar's participation in ethics has not changed substantially since *Lathrop*. The State Bar's present District Professional Responsibility Committees perform the same function as their predecessors, the original grievance committees noted in *Lathrop*: providing essential support to an independent arm of the Wisconsin Supreme Court, now BAPR. Gimbel Aff., ¶ 22.[11]

This summary of the Bar's continuing structure, purposes, and activities serves to demonstrate another reason why certiorari should be denied: unless this Court were to abandon the balance struck in *Lathrop* and to adopt a wholly new standard for judging the constitutionality of integrated bars, this case calls for nothing more than the application of settled law to the particular facts and circumstances of this *one* state bar. Such a fact-bound exercise in alleged error correction does not fall within the scope of this Court's Rule 17.1 concerning the considerations governing review on certiorari.

II.

THE SEVENTH CIRCUIT'S DECISION UPHOLDING THE CONSTITUTIONALITY OF THE INTEGRATED STATE BAR UNDER *LATHROP* IS IN HARMONY WITH ALL DECISIONS BY OTHER FEDERAL AND STATE COURTS.

Every federal and state court (other than the district court reversed below) that has examined the issue has

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[11] Further evidence of the similarities between the present State Bar and the State Bar considered in *Lathrop* can be found in the appendix to *Lathrop v. Donohue*, 10 Wis. 2d 230, 102 N.W.2d 404 (1960), in which the Wisconsin Supreme Court noted the "major activities" of the State Bar.

upheld the constitutionality of the integrated bar. Three circuits have now so held: the Seventh Circuit here; the Third Circuit in *Hollar*, 857 F.2d at 166-68; and the Eleventh Circuit in *Gibson*, 798 F.2d at 1566. In each case, the court relied upon this Court's decision in *Lathrop*. *Id.* Federal district courts and state courts have also generally relied upon *Lathrop* in upholding the constitutionality of integrated bars. *See, e.g., Arrow v. Dow*, 544 F. Supp. 458, 460-63 (D.N.M. 1982) (assuming constitutionality of integrated bar but striking down certain activities); *Chapman*, 509 A.2d at 757 (assuming constitutionality of integrated bar in New Hampshire); *Falk*, 411 Mich. at 138, 305 N.W.2d at 228 (assuming constitutionality of integrated bar in Michigan); *Petition of Rhode Island Bar Ass'n*, 118 R.I. 489, 374 A.2d 802 (1977) (upholding Bar dues requirement as a condition of right to practice law). Given the remarkable uniformity on this issue, petitioner is simply wrong in asserting that *Lathrop* should be reconsidered to "offer guidance" to lower courts. No such guidance is necessary. Reexamination of this settled issue at this late date could only mean disruption of some thirty-two integrated state bars across the country.

Admittedly, courts continue to address questions regarding the accommodation of dissent within integrated bars. *See Hollar*, 857 F.2d at 170-71 (remanding matter to district court for determination whether integrated bar spent funds and expressed opinions "to advance causes germane to the purposes underlying its integration"); *Gibson*, 798 F.2d at 1569-70 (remanding matter to examine whether integrated bar's legislative program used mandatory dues to assume "political or ideological position on matters that are germane to the Bar's stated purposes"); *Keller v. State Bar of California*, 47 Cal. 3d 1152, 255 Cal. Rptr. 542, 767 P.2d 1020 (1989), *petition for cert. filed*,

No. 88-1905 (concluding that California's integrated bar is subject to same limitations on speech that are applied to other governmental agencies); *Chapman*, 509 A.2d at 759 (narrowing, based on First Amendment concerns, the New Hampshire Bar's lobbying activities "to those matters . . . related directly to the efficient administration of the judicial system; the composition and operation of the courts; and the education, ethics, competence, integrity and regulation, as a body, of the legal profession"). But that issue is not before the Court as part of the present petition. Just as in *Lathrop*, *Hollar*, and *Gibson*, the issue has been remanded for further consideration. At best, the present petition is therefore interlocutory and premature.

CONCLUSION

For the reasons stated, the petition should be denied.

Dated this 22nd day of June, 1989.

Respectfully submitted,

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